**Memorandum**

|  |  |
| --- | --- |
| **To:** | Martha A. Duggan; Senior Principal, Regulatory Affairs, NRECA |
|  |  |
| **From:** | Wendy Huff Ellard; Zachary B. Busey |
|  |  |
| **Date:** | November 16, 2018 |
|  |  |
| **Re:** | Required Compliance with Federal Laws Applicable to Marijuana & Other Drugs Including the Drug-Free Workplace Act of 1988 |
|  |  |

1. Question Presented

The National Rural Electric Cooperative Association (NRECA) is the national service organization for more than 900 not-for-profit rural electric utilities that provide electric energy to over 42 million people in 47 states or 12 percent of electric customers. Every year, NRECA’s member cooperatives lose critical facilities and infrastructure to ice storms, tornadoes, floods, hurricanes and the like. If this damage is caused by a major disaster declared by the President of the United States, then many of the cooperatives’ response and recovery costs are eligible for reimbursement assistance from the Federal Emergency Management Agency (FEMA) via its Public Assistance Program.

Disaster assistance under FEMA’s Public Assistance Program is administered as a federal grant and as such is subject to the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, codified at 2 C.F.R. Part 200, and adopted by the U.S. Department of Homeland Security (DHS) at 2 C.F.R. Part 3002 (the “Uniform Rules”). In addition to complying with the Uniform Rules, FEMA requires that its grant recipients and subrecipients comply with the enabling laws, implementing regulations, and FEMA policies for the respective financial assistance program, and all other applicable Federal laws, regulations, and executive orders. Additionally, DHS issues, on an annual basis, Standard Terms and Conditions that apply to recipients of Federal awards from all DHS Components, including FEMA. In addition, a recipient executes a Standard Form (“SF”) 424B or 424D with its financial assistance application to FEMA that contains standard assurances. The DHS Standard Terms and Conditions and SF 424B and D contain references to many cross-cutting Federal laws and regulations that may apply to a FEMA award.

In light of the current apparent trend on the part of states to proclaim varying levels of tolerance with respect to use and/or possession of certain controlled substances, specifically cannabis[[1]](#footnote-2) or marijuana, NRECA has asked for our evaluation of whether the actions of individual states could potentially impact reimbursement funding otherwise eligible for grant assistance to its member cooperatives through FEMA’s federal grant programs.

1. Short Summary

No matter what a state does with respect to medical or recreational marijuana, marijuana (in any form) remains illegal under federal law. Additionally, DHS/FEMA follows the Government-wide policies and procedures found in guidance issued by the U.S. Office of Management and Budget (OMB) regarding compliance with the federal Drug-Free Workplace Act of 1988 and requires strict compliance of all grant recipients and subrecipients.

While it remains within the realm of possibility, we have not yet seen FEMA or any federal agency threaten—or actually withhold—funding from a state because the recipient state has legalized marijuana to any degree. However, we recommend that cooperatives, as employers, continue adhering to federal law in making workplace decisions and in implementing a drug-free workplace to ensure compliance with the Drug-Free Workplace Act of 1988. This is especially true when, like here, the “employer” is the recipient of potentially large sums of federal funding and the standard terms and conditions applicable to that funding specifically require compliance with federal law.

1. History and Status of Cannabis under Federal Law

“Cannabis” is and has always been illegal under the federal Controlled Substances Act (“CSA”). The CSA was passed as Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970. It was signature legislation signed by President Nixon and as a whole, formed the backbone of the “war on drugs.” Cannabis has always been a Schedule 1 substance, along with heroin, LSD, and ecstasy, for example. As a Schedule 1 substance, according to federal law, cannabis has a high potential for abuse and no currently accepted medical use. In turn, the possession or use of cannabis—namely as marijuana—for any reason is illegal under the CSA.

Despite the very plain language of the CSA, under the Obama administration, a number of guidance memos were distributed throughout the Department of Justice. These memos culminated with the “Cole Memo,” authored by Deputy Attorney General James Cole. The Cole Memo provided guidance on enforcement of the CSA “in light of state ballot initiatives to legalize under state law the possession of small amounts of marijuana and to provide for the regulation of marijuana production, processing, and sale.” In short, the Cole Memo directed a more hands-off approach in “jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale and possession of marijuana.” The Cole Memo was comprehensive in that it applied to “all federal enforcement activity, including civil enforcement, criminal investigations and prosecutions, concerning marijuana in all states.”

For nearly five years, the Cole Memo largely relegated marijuana control and enforcement to the states. Then, under the Trump administration, on January 4, 2018, Attorney General Jeff Sessions issued a memo rescinding the Cole Memo and the guidance memos related to it. Sessions advised that his memo was intended to return prosecutorial discretion to local U.S. Attorneys and other on-the-ground personnel. Commentators largely viewed the memo as signaling the DOJ’s intent to prosecute marijuana-related activities in states that have legalized it.

Regardless of the varying guidance that has been released by the Attorney General and DOJ, Congress has largely prohibited federal authorities from taking legal action against businesses and individuals participating in state-run medical marijuana programs. These efforts began in conjunction with the Cole Memo and led to the then-named Rohrabacher-Farr Amendment. The Amendment, today known as the Rohrabacher-Blumenauer Amendment, is a budgetary amendment that expressly prohibits the DOJ from using any funds whatsoever to interfere with state-run medical marijuana programs. The Amendment has survived legal challenges, and it has been continuously adopted since 2014, including on September 28, 2018, when Congress approved the most recent spending bill that runs through December 7, 2018. In sum, the reason federal authorities are not prosecuting individuals and companies for medical marijuana may have less to do with ideology and politics, and more to do with a lack of funding.

There is a possible change to the federal law on the horizon, but only with respect to a special class of products derived from cannabis and generally referred to as “industrial hemp.” Putting aside botany specifics, cannabis contains a number of different compounds—chief among them are tetrahydrocannabinol, or THC, and cannabidiol, or CBD. THC is what produces marijuana’s “high.” CBD, by comparison, is generally considered not to produce a “high” or any other intoxicating effect. CBD is also generally considered to be a viable option for treating certain medical conditions, such as epilepsy, anxiety disorders, and chronic pain. When intended for medical use, CBD products often do not contain tangible amounts of THC—they contain scientifically de minimis amounts of THC—especially if intended for use by minors.

CBD products also include a special category of items produced from “hemp.” While hemp is still a part of the cannabis family, and therefore there is no “hemp” exception to federal law’s prohibition on CBD products, federal law does recognize “industrial hemp.” In 2014, Congress passed the Farm Bill. The Farm Bill allows the cultivation of “industrial hemp,” defined as any part of a cannabis plant with less than .3 percent THC. The cultivation, however, must be in connection with a specifically designated pilot program that itself is connected to a university or state agricultural department. Against this backdrop, Senator Mitch McConnell recently introduced the Hemp Farming Act of 2018, S. 2667. The bill expands the Farm Bill so as to allow for the commercial cultivation and distribution of “industrial hemp.” In short, the bill sets the stage for hemp-derived CBDs to be decriminalized at the federal level. This, in turn, will open the door for CBD products to be regulated and sold—provided the products include hemp-derived CBDs, not marijuana-derived CBDs. For now, however, CBDs (and, therefore, products made from them) remain illegal under federal law.[[2]](#footnote-3)

1. State Actions and Impact to Federal Funding

Under the current framework, states that pass laws to allow any type of tolerance for any derivation of the cannabis plant are technically in violation of federal law. Nonetheless, these laws are certainly a going trend. This began with medical marijuana and has expanded to recreational marijuana.

States are ignoring federal law largely because of the Rohrabacher-Farr Amendment, and secondarily because the federal Drug Enforcement Agency (DEA) has made it clear that low-level marijuana offenses (and CBD products) are not an enforcement priority. Accordingly, the states assume—and, to date, have assumed correctly—that the federal government will not interfere with their respective medical and recreational marijuana programs.

With respect specifically to federal grant funding provided under FEMA’s Public Assistance and Hazard Mitigation Grant Programs, availability of these funds is triggered by the impacted state’s Governor asking the President to issue a federal emergency or disaster declaration, and the President approving the request and the specific aid to be provided. The President has wide authority in review of these requests; this is a discretionary function, the declaration authority under the Stafford Act is entirely permissive.[[3]](#footnote-4) Even so, the breadth of this authority was a focus earlier this year when it was rumored that the Trump administration threatened otherwise eligible disaster aid needed for states that had refused to follow the administration’s positions on immigration enforcement. The declarations were eventually awarded so the issue was tried only in the court of public opinion; no final legal analysis was ever required as to whether non-compliance with federal law or policy could be used to block disaster assistance.

Once a federal emergency or disaster is declared, the approved programs and associated funding is administered by State-grantee recipients. As part of this each state is required to sign a FEMA-State Agreement including various terms and conditions that will control the award. This Agreement typically incorporates a signed certification relating to maintenance of a drug-free workplace as required by the Drug-Free Workplace Act of 1988. DHS/FEMA had previously required compliance via 44 C.F.R. Part 17 but in 2011 removed the rule at Part 17 in favor of issuance of a brief regulation at 2 C.F.R. Part 3001 which generally adopts the Government-wide policies and procedures found in guidance issued by the U.S. Officer of Management and Budget (OMB).

The regulation at 2 C.F.R. Part 3001 confirms that all DHS award recipients comply with the Drug-Free Workplace Act of 1988. The DHS Standard Terms and Conditions for FY 2018 confirm the following regarding necessary compliance with the federal government’s drug-free workplace regulations, namely the Drug-Free Workplace Act of 1988:

Recipients must comply with drug-free workplace requirements in Subpart B (or Subpart C ,if the recipient is an individual) of 2 C.F.R. Part 3001,which adopts the Government-wide implementation (2 C.F.R.Part182) of sec.5152¬5158 of the Drug-Free Workplace Act of 1988(Pub.L.100-690,TitleV, Subtitle D; 41 U.S.C. 8101). *See attached* DHS Standard Terms and Conditions for FY 2018 at 2.

The DHS Standard Terms and Conditions further confirm that, while the above provision mentions “recipients” specifically, which is the term used by FEMA to refer to the state grantee entity that directly receives funds and administers the grant programs, “financial assistance awards terms and conditions flow down to subrecipients, unless a particular award term or condition specifically indicates otherwise.” *Id.* at 1.

It is within the realm of possibility that FEMA could withhold otherwise eligible funding from a recipient state (and its subrecipient applicants, e.g., NRECA member cooperatives) due to violation of federal law regarding marijuana or any other drug.  The reality, however, is that the federal government is not likely to take any action based on these type laws, as a majority of states now have some sort of marijuana tolerance and the trend is continuing.

FEMA will however continue reviewing the policies of each State-grantee recipient and each grant awarded to a subrecipient applicant for compliance with all grant terms and conditions.  This includes compliance with the requirements of the Drug-Free Workplace Act.  This is confirmed in the DHS Standard Terms and Conditions.  This continues to be true even when a state implements a medicinal or recreational marijuana program. Again, it isn’t so much what the state has done (or law that it passes) with respect to cannabis, marijuana, or hemp, it is whether the entities (as employers) comply with all imposed terms and conditions of the federal grant. As compliance with the Drug-Free Workplace Act is required, we suspect all State-grantee recipients are continuing to comply with it (even those with otherwise liberal policies). We recommend that all NRECA member cooperatives likewise comply.

1. Compliance Basics of the Drug-Free Workplace Act of 1988

For informational purposes, we provide below the basics of compliance with the Drug-Free Workplace Act of 1988 and its associated rules and regulations. Below are also answers to some of the most common questions with respect to compliance. Note however that it is important that NRECA and its member cooperatives consult their legal counsel with any specific questions to ensure full compliance with all requirements and terms and conditions of any federal grants received.

Despite what your respective state law allows, NRECA and any member cooperative can prohibit the manufacture, distribution, dispensing, possession, or use of a controlled substance in the workplace. This is allowed under federal law and should be followed regardless of what the applicable state law says based on the nature of providing electric service. Appropriate action based on violation of such prohibition is also allowable. As explained below, this specifically includes disciplinary action against applicants and employees, up to and including the rejection of an applicant or the termination of an employee. Please note that there exists the possibility that said disciplinary action may be prohibited by a state law or regulation. But NRECA and any member cooperative should continue to adhere to federal law, and federal law expressly prohibits the manufacture, distribution, dispensing, possession, or use of a controlled substance in the workplace, such as marijuana and other products containing CBDs.

1. Can an employee be disciplined or fired for using marijuana?

Yes. Marijuana use or possession in the workplace is grounds for disciplinary action, up to and including immediate termination. Not only is marijuana illegal under federal law, but like alcohol, marijuana is an intoxicant. For this reason alone, employers can take disciplinary action based on marijuana use or possession in the workplace, up to and including immediate termination. The result is the same if an employee uses medical marijuana away from work and, for example, fails a drug test.

Please note that there are at least eleven states that arguably offer some degree of workplace protections related to medical marijuana.[[4]](#footnote-5) In three of those states—Massachusetts, Connecticut, and Rhode Island—courts have refused to dismiss wrongful termination lawsuits filed by employees terminated because of medical marijuana. In the Connecticut and Rhode Island cases, rejected applicants filed suit alleging, among other things, that they were not hired because they were participating in the respective state’s medical marijuana program. In both cases, the employers sought dismissal. The employers argued that whether the applicants were participating in a medical marijuana program was irrelevant because the applicants had admitted to using marijuana. Because of this admission, reasoned the employers, the applicants’ failure-to-hire theory should fail as a matter of law. This argument was rejected by both courts. While the courts took different paths, both concluded that it could not determine as a matter of law whether the employers failed to hire the applicants because of marijuana use, or because of participation in the respective state’s medical marijuana program.[[5]](#footnote-6)

In Massachusetts, an employee was fired for actively using medical marijuana. The employee sued for wrongful termination. In response, the employer argued that the employee was terminated for using marijuana and succeeded in getting the lawsuit dismissed. On appeal, however, the dismissal was reversed. The Massachusetts Supreme Judicial Court held that because using medical marijuana was allowed by state law, the employee’s lawsuit should not have been dismissed at such an early stage.[[6]](#footnote-7)

These decisions are concerning for employers, but they do not alter how marijuana is viewed under federal law. For now, federal law is what should dictate how an employer addresses marijuana in the workplace, and drug-free-workplace policies can and should be followed.

1. Do I have to make workplace accommodations for employees using medical marijuana?

Not quite. Broadly stated, marijuana use does not have to be tolerated in any form or at any time. This includes workplace accommodations. Every federal court to consider the issue has held that marijuana use is neither protected nor, for example, a reasonable accommodation under the Americans with Disabilities Act (“ADA”).

To start, as noted above, marijuana is an intoxicant. As such, an employee would be hard pressed to describe the use of marijuana as reasonable. That aside, marijuana and CBD remain illegal under federal law. Thus, they fall within the “illegal use of drugs” exclusion to the ADA.[[7]](#footnote-8) The ADA, therefore, does not apply.[[8]](#footnote-9)

While this is good news for employers, it does not provide the answer to every question or situation. Take, for example, an employee asking to use medical marijuana outside of the workplace to treat a medical condition. While this may not be a *reasonable* accommodation under the ADA, the employer should still engage in the interactive process required by the ADA. Moreover, a general request for leave to treat a medical condition may trigger an employer’s obligations under the Family and Medical Leave Act.[[9]](#footnote-10)

As another example, say an employer learns from social media that two employees used medical marijuana outside of the workplace. If one employee is terminated but the other is not, this inconsistency could be seen as discriminatory should the employees be different races, genders, etc. Or say an employer learns an employee sometimes uses marijuana outside of the workplace not just for medical purposes but in connection with a religious practice or ritual. This may provide an employer grounds for drug testing the employee, but using it as grounds for immediately terminating the employee will likely give rise to a charge of religious discrimination.

1. Does my entity need to change its drug testing policy?

If the policy has not been reviewed in some time, it likely needs to be updated as a matter of course. Beyond that, whether under the federal Drug Free Workplace Act, or in connection with a state’s workers’ compensation program, companies can still require a drug-free workplace. Also, because marijuana is illegal under federal law, testing for it is not a medical examination under the ADA. Therefore, the ADA’s restrictions on medical examinations and inquiries do not apply. That said, because many drug tests cover substances beyond marijuana—including prescription medications—the overall drug testing program should remain in compliance with the ADA (or a state’s law if and when it provides heightened requirements).

1. Conclusion

In the end, federal law continues to dictate how employers address marijuana in the workplace. While the possibility exists that a federal agency threatens to withhold funding because of a recipient state’s marijuana program, that is a dispute between the agency and recipient state. For now, unless and until there is a change at the federal law, NRECA and its member cooperatives should continue adhering to federal law and all imposed terms and conditions of any federal grants provided by FEMA or otherwise; in both cases, this includes compliance with the Drug-Free Workplace Act. If you have any questions or like to further discuss these or any related issues, please let us know.

**Attachments:**

1. DHS Standard Terms and Conditions for FY 2018
2. Example Certification Regarding Drug-Free Workplace Requirements

1. “Cannabis” refers to a species of plant. Both “hemp” and “marijuana” come from varieties of that plant. [↑](#footnote-ref-2)
2. While the DEA recently “approved” a CBD-based prescription drug, it was a product-specific approval. It was not a general approval of CBD-based products or any broad exception created for them. [↑](#footnote-ref-3)
3. *See* Stafford Act Sec. 401, Procedure for Declaration; 42 U.S.C. 5170. [↑](#footnote-ref-4)
4. Arizona, Arkansas, Colorado, Connecticut, Illinois, Massachusetts, New York, Oklahoma, Pennsylvania, Rhode Island, and West Virginia. Many of these states, including Oklahoma, create exceptions to these workplace protections if protections put at risk a license, funding, or other benefit that the employer enjoys/receives under federal law. [↑](#footnote-ref-5)
5. *Callaghan v. Darlington Fabrics Corp.*, 2017 WL 2321181 (R.I. Super. Ct. May 23, 2017); *Noffsinger v. SSC Niantic Operating Co. LLC*, 2017 WL 3401260 (D. Conn. Aug. 8, 2017). [↑](#footnote-ref-6)
6. *Barbuto v. Advantage Sales & Mktg., LLC*, 78 N.E.3d 37 (Mass. 2017). [↑](#footnote-ref-7)
7. 42 U.S.C. § 12210(d)(1). [↑](#footnote-ref-8)
8. *See, e.g.*, *James v. City of Costa Mesa*, 700 F.3d 394, 398 (9th Cir. 2012) (generally discussing the issue); *see also Forest City Residential Mgmt., Inc. ex rel. Plymouth Square Ltd. Dividend Hous. Ass’n v. Beasley*, 71 F. Supp. 3d 715, 730-31 (E.D. Mich. 2014) (not reasonable accommodation under Fair Housing Act or Rehabilitation Act). [↑](#footnote-ref-9)
9. *See* 29 U.S.C. §§ 2601, et seq. [↑](#footnote-ref-10)